

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE FORMAL)	
COMPLAINT OF DAVID L. BENFER)	
AGAINST DELMARVA POWER & LIGHT)	COMPLAINT DOCKET NO. 15-1380
COMPANY REGARDING A RESTORATION)	
DISPUTE (FILED SEPTEMBER 8, 2015))	

**OPPOSITION OF STAFF OF THE DELAWARE PUBLIC
SERVICE COMMISSION TO DELMARVA POWER &
LIGHT COMPANY’S ANSWER AND MOTION TO DISMISS**

The Staff of the Delaware Public Service Commission (“Staff”), by and through its undersigned counsel, hereby opposes the Answer and Motion to Dismiss (“Motion”) filed by Delmarva Power & Light Company (“Delmarva”) and in support thereof states as follows:

1. #. The Delaware Public Service Commission (“Commission”) has exclusive and original jurisdiction over Mr. David L. Benfer’s consumer complaint (the “Complaint”) which alleges a public utility¹ (Delmarva Power & Light Company or “Delmarva”) caused property damages while laying underground natural gas pipes. Under the explicit terms of 26 *Del. C.* §201(a),² the Commission not only supervises and regulates the rates, property rights, equipment, facilities, etc., of all public utilities, but it also supervises and regulates ***all public utilities*** (the entities themselves) as necessary to carry out the provisions of Title 26 of the Delaware Code. Hence, 26 *Del. C.* §201(a) does not limit the Commission’s jurisdiction to only rates, services, and tariffs. Rather, the Commission regulates a non-exclusive list of public utility

¹ 26 *Del. C.* §102(2) provides, in pertinent part, that a "public utility includes every ... corporation ... that now operates or hereafter may operate for public use within this state ... any natural gas, electric (excluding electric suppliers as defined in § 1001 of this title), water, wastewater (which shall include sanitary sewer charge), telecommunications (excluding telephone services provided by cellular technology or by domestic public land mobile radio service) service, system, plant or equipment.

² 26 *Del. C.* §201(a) provides, in pertinent part, that the Commission has “exclusive original supervision and regulation of all public utilities ***and also over*** their rates, ***property rights, equipment, facilities*** ... so far as may be necessary for the purpose of carrying out the provisions of this title.” (emphasis added)

issues that includes, among other items, the operations and practices of all public utilities.

Section 209(a)(1) of Title 26 shows this interpretation to be correct because that section provides that the Commission may fix just and reasonable *standards, practices, or services*, etc., to be furnished, imposed, observed, and followed by any public utility.³

2. Other sections in Title 26 also support this interpretation and show that the Commission has exclusive and original jurisdiction over all public utilities (as defined in 26 *Del. C.* §102(2), including those that excavate and install underground pipes. For example, the Commission may investigate any matter concerning any public utility (26 *Del. C.* §206).⁴ The Commission also can require a public utility to comply with the laws of this State and to conform to the duties imposed upon it under Delaware law (26 *Del. C.* §212).⁵ In addition, the Commission has jurisdiction over any public utility that engages in the following: A merger or consolidation; a sale, lease, assignment, mortgage, or disposal of or encumbrances of essential parts of a public utility's plant, equipment, or other property; an issuance of stock, notes, bonds, and other indebtedness; an assumptions of liability payable or maturing over one year; and an acquisition of control of any public utility doing business in Delaware. 26 *Del. C.* §§215(a) and (b). Hence, although Delmarva mistakenly believes that the Commission holds jurisdiction only over matters involving impacted services, rates, or tariff provisions, in reality the Commission's jurisdiction extends beyond such limited areas of review.

³ 26 *Del. C.* §209(a)(1) provides, in pertinent part, that the Commission may, after hearing, by order in writing, *fix just and reasonable standards*, classifications, regulations, *practices*, measurements or services *to be* furnished, imposed, *observed and followed* thereafter *by any public utility*. (emphasis added)

⁴ 26 *Del. C.* §206 provides that the Commission may investigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility.

⁵ 26 *Del. C.* §212 provides that the Commission may, after hearing, upon notice, by order in writing, require every public utility to comply with the laws of this State and any ordinance of any political subdivision thereof relating thereto, and to conform to the duties imposed upon it thereby or by the provisions of its own charter, whether obtained under any general or special law of any state.

3. The holding in *McHughes v. Tidewater Utilities, Inc.*, 2002 WL 31399462 (Del. P.S.C. March 19, 2002), does not divest the Commission of jurisdiction over Mr. Benfer's consumer complaint, nor does it apply to the manner in which Delmarva performs excavation and installation work through a contractor. Rather, that case involved distinguishable facts from this matter. In *McHughes*, the Commission first upheld the hearing examiner's conclusion that under 26 *Del. C.* §201, "the Commission clearly has authority over Tidewater as a public utility, and that authority may extend over its contracts under Section 201's inclusion of 'property rights.'" *McHughes*, 2002 WL 31399462 at ¶22. It then concluded, however, that its jurisdictional limits did not include the authority to resolve a contractual dispute involving whether Mr. McHughes was entitled to free water from a company ("MHC") that owned the mobile home community in which McHughes lived. The Commission reached this conclusion because MHC was not a public utility, and the dispute between McHughes and MHC involved a contractual dispute between a landlord and a tenant. *Id.* (citing *Liborio II, L.P. v. Artesian Water Co.*, 593 A.2d 571 (Del. Super. 1990)).⁶ As to Tidewater's water service agreement with MHC, the Commission also acknowledged that arguably that contract was within its jurisdiction; however, it declined to exercise such power of review because the existence of the contract alone did not bestow upon it the authority to determine whether the contract amended McHugh's lease with MHC. *McHughes*, 2002 WL 31399462 at ¶22.

4. Here, the Complaint alleges that Delmarva, a regulated public utility, and Brandywine Construction Co. ("BCCI"), "acting on behalf of Delmarva," caused the depression of four sections of pavement on Mr. Benfer's property because Delmarva was installing a gas line. Complaint, ¶2. Consistent with the conclusions reached in *McHughes*, the Commission has

⁶ The Delaware Superior Court in *Liborio II* concluded that the PSC had no jurisdiction to consider a breach of contract action. 593 A.2d at 576.

jurisdiction over this Complaint based on the provisions of 26 *Del. C.* §201(a) and because Delmarva is a regulated public utility. When a complaint alleges that a public utility caused damages to a consumer's property in the course of installing underground natural gas pipes, the Commission may review such complaint and determine whether sufficient facts exist to order a remedy for the damages. This conclusion holds true even if the regulated public utility utilizes a contractor to accomplish the excavation and installation of its underground natural gas pipes.

Infra. at ¶6.

5. The Commission has jurisdiction over public utilities even when such utility hires another company to perform excavation work to lay underground pipes as part of the regulated utility's right to access easements over others' real property (such as Mr. Benfer's property). As a regulated public utility, Delmarva cannot abdicate its duty to perform excavation in a safe and responsible manner and to restore property that it damages while excavating and installing underground natural gas pipes. But this is exactly what Delmarva attempts to accomplish in this proceeding. Here, Delmarva seeks to avoid its duty and responsibility to restore damaged property caused by excavating and installing its underground pipes and does so by arguing BCCI is the party responsible for the damages. Under Delaware law, however, when one has undertaken to do a certain thing or to do it in a particular manner, he cannot, by employing an independent contractor, avoid liability for injury resulting from a nonperformance of duties assumed by the independent contractor under his agreement. *Schagrin v. Wilmington Medical Center, Inc.*, 304 A.2d 61, 64 (Del. Super. 1973) (citing *Giusti v. C. H. Weston Co.*, 165 Or. 525, 108 P.2d 1010 (1941)).

6. Delmarva cannot avoid liability for causing property damages when it excavates and installs underground natural gas pipes, whether it does such work using a contractor or not.

Delmarva owes a duty to perform such excavations and installations in a safe and responsible manner—especially when it does so in a public setting and on property owned by others. Based on Delmarva’s special status as a regulated public utility, it possesses the right to install pipes underneath the property of others’ regardless of whether it possesses an easement or not and also is obligated to restore roads, highways, streets, pavements, etc. if these are disturbed from laying pipes. *See, e.g., 26 Del. C. §1301(a)(1),*⁷ *26 Del. C. §1301(b)(2)a,*⁸ and *26 Del. C. §§902(a)*⁹ and *(c)(1).*¹⁰

7. Hence, although Delmarva has the advantage (as a public utility) of accessing and excavating property to install and maintain its natural gas pipes underground, it seeks, at the same time, to avoid liability if a contractor—at the direction of Delmarva—causes damages to an owner’s property. If the Hearing Examiner or Commission were to allow Delmarva to avoid responsibility for any property damages caused by a public utility’s excavation work, such policy decision would result in dire consequences for all property owners. Delmarva would always hire third parties to perform its excavations and underground pipe installations and thereby avoid all

⁷ *26 Del. C. §1301(a)(1)* provides, in pertinent part, that every corporation organized for the purpose of the production, distribution and sale of gas and also every corporation organized for the supply and distribution of water, every corporation organized for the collection and treatment of wastewater and every corporation organized for the transportation and storage of oil, in addition to the powers conferred upon corporations generally, may lay down necessary pipes, mains and conduits beneath the public roads, highways, streets, avenues and alleys of any county, city, incorporated town or district of this State.

⁸ *26 Del. C. §1301(b)(2)a* provides, in pertinent part, that the portions of the surfaces of the roads, highways, streets, avenues and alleys disturbed in laying the pipes shall be immediately restored to their original condition. Any pavements which are removed for the purpose of laying or repairing the pipes, mains and conduits shall be restored to as good condition as they were previous thereto and shall be maintained the same for 6 months after the completion of the work.

⁹ *26 Del. C. §902(a)* provides, in pertinent part, that any telegraph or telephone corporation organized under Chapter 1 of Title 8, in addition to the powers conferred upon corporations generally, may occupy and use the public streets, roads, lanes, alleys, avenues, turnpikes and waterways within this State, or elsewhere, if it extends its lines and business, for the erection of poles and wires or cable or underground conduits, portions of which they may lease, rent or hire to other like companies.

¹⁰ *26 Del. C. §902(c)(1)* provides, in pertinent part, the portions of the surfaces of the streets, avenues or alleys disturbed in laying the wires, cables or underground conduits shall be immediately restored to their original condition and any pavements which are removed for the purpose of laying or repairing the wires, cables or underground conduits shall be restored to as good condition as they were previous thereto and so maintained for 6 months after the completion of the work.

liability for any damages caused by such actions—actions which enable Delmarva to provide natural gas services to its existing and new customers. The Hearing Examiner and Commission should avoid following this path of abdication.

8. Delmarva mistakenly assumes that because BCCI is allegedly the responsible party which caused the damages to Mr. Benfer's property and because BCCI is not a public utility, the Commission has no jurisdictional power over this case. Generally, a company that employs an independent contractor to perform work on its behalf will not be held liable for the torts of the independent contractor if such torts are committed in the performance of the contracted work. Restatement (Second) of Torts § 409 (1965); *Colon v Gannett Co., Inc.*, 2012 WL 3090916, at *2 (Del. Super. April 26, 2015); *see also Fisher v. Townsends, Inc.*, 695 A.2d 53, 58 (Del. 1997). However, this general rule has been substantially eroded by a number of exceptions. *See* Restatement (Second) of Torts §§ 410–429. The rule “can now be said to be ‘general’ only in the sense that it is applied where no good reason is found for departing from it.” Restatement (Second) of Torts § 409 cmt. b.

9. Thus, under Delaware law, if one person (Delmarva) hires another (BCCI) to perform work on its behalf, and the second person causes damages to a third person (Mr. Benfer) or his property, the first person (Delmarva) may be held liable for the damages under the legal theory of vicarious liability. Under vicarious liability, the relationship between the parties must first be identified and distinguished. Such relationships include principal/agent; master/servant; employer/employee; and agent-independent contractor and non-agent independent contractor.

“All masters are principals and all servants are agents. There are some agents, however, who are not servants. All agents who are not servants are regarded as independent contractors. In addition, all nonagents who contract to do work for another are also termed ‘independent contractors.’ Consequently, there are agent-independent contractors and nonagent independent contractors.”

Fisher, 695 A.2d at 58 (citations omitted). Under the first part of this legal analysis (i.e., the two-part *Fisher* analysis), a court engages in a fact-specific assessment to determine if the tortfeasor is a servant or an independent contractor. *Id.* at 58-61. In making this determination, courts have recognized that no single rule can be laid down to determine whether a given relationship is that of a servant to a master as distinguished from an independent contractor. *Id.* at 58; *See White v. Gulf Oil Corp.*, 406 A.2d 48, 51 (Del. 1979). Instead, each particular case must depend on its own facts. *Fisher*, 695 A.2d at 58.¹¹ That determination is ordinarily made **by the factfinder**. *Id.* at 59-60 (emphasis added).

10. If a tortfeasor appears to be an independent contractor and not a servant, then a court engages in the second part of the *Fisher* analysis to determine whether that independent contractor is an agent.¹² Then the central question focuses on whether the principal's control or direction dominates the manner or means of the work performed. *Id.* at 61 (citing *E.I. du Pont de Nemours & Co., Inc. v. Griffith*, 130 A.2d 783, 785 (Del. 1957)). If it does, the independent contractor becomes an agent capable of rendering the principal vicariously liable for the acts of the independent contractor. *Fisher*, 695 A.2d at 61. Thus, determining whether a party is an agent independent contractor or a non-agent independent is key to any liability determination.

11. The second part of the *Fisher* analysis centers on whether the principal generally directed or controlled the manner and means of the work performed by the independent contractor. *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *21 (Del. Ch. 2010). If the principal assumes the right to control the time, manner, and method

¹¹ If a court determines that a tortfeasor is a servant, the analysis ends because a master (principal) may be held liable for the actions of its servant (agent) committed within the scope of his employment. *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Secs., Inc.*, 953 A.2d 726, 735 (Del. Ch. 2008).

¹² As noted in *West v. Flonard*, 2010 WL 892190, at *3, fn. 22 (Del. Super. Jan. 15, 2010), even if one party admits he is an independent contractor or is found to be an independent contractor, this fact is not determinative. An issue would still exist as to whether such party was an agent or non-agent independent contractor. All factors set forth in the Restatement must still be considered. *Id.*

of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract, a master/servant type of agency relationship has been created and liability may ensue. *Fisher*, 695 at 59; see *Gooden v. Mitchell*, 21 A.2d 197, 200-01 (Del. Super. 1941). If, however, a worker is not subject to that degree of physical control, but is subject only to the general control and direction by the principal, that worker is termed an independent contractor. *Fisher*, 695 at 59; *ING Bank, FSB v. American Reporting Co., LLC*, 843 F. Supp. 2d 491, 495 (D. Del. 2012). In other words, the “right to control” is a central consideration for any servant/independent contractor analysis. *Id.* However, the degree of control exercised by a principal is not the only consideration.

12. The Delaware Supreme Court has recognized the Restatement (Second) of Agency § 220 as an “authoritative source for guidance” in determinations on whether a person who acts for another is a servant or independent contractor. *Id.* Section 220 provides the following nonexclusive list of factors that should be considered in any servant/independent contractor analysis:

- (a) the extent of control, which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Because the Hearing Examiner and Commissioner must determine the status of the parties and whether vicarious liability would in any way affect the scope of the Commission's jurisdiction over Delmarva itself, and because such a determination is factually specific, the Hearing Examiner cannot grant at this stage of the proceedings Delmarva's Motion to Dismiss. A more detailed review of the facts and a careful legal analysis based on those facts would be required here under Delaware law.

13. Moreover, the Hearing Examiner and the Commission could find that Delmarva has a non-delegable duty to perform excavations and installations of underground pipes in a safe and responsible manner and as such, using an independent contractor will not remove its liability for damages caused to the property of third-parties (such as Mr. Benfer). For example, the California Supreme Court has applied the non-delegable duty doctrine to find a motor carrier liable for the negligence of its independent contractor. In *Eli v. Murphy*, 39 Cal. 2d 598, 248 P.2d 756 (1952), plaintiffs were injured when their car was hit by a tractor-trailer driven by individuals who were transporting freight under a contract with a company ("C.M.T.") licensed by the California Public Utilities Commission ("PUC"). Citing section 428 of the Restatement Second of Torts (work performed under a public franchise), the California Supreme Court noted that C.M.T., operating as a highway common carrier, was engaged in a "business attended with considerable risk," and the Legislature had subjected it and similar carriers to the full regulatory power of the PUC to protect the safety of the general public. *Id.* at 599-600, 248 P.2d 756. The Court there also reasoned that the effectiveness of the PUC's regulatory authority necessarily would be impaired if the carrier were permitted to conduct business

"by engaging independent contractors over whom it exercises no control. If by the same device it could escape liability for the negligent conduct of its contractors, not only would the incentive for careful supervision of its business be reduced, but members of the public who are injured would be deprived of the financial responsibility of those who had been

granted the privilege of conducting their business over the public highways.” *Id.* at 600, 248 P.2d 756.

Accordingly, the Court stated that to protect the public from financially irresponsible contractors, and to strengthen safety regulations, it was necessary to treat the carrier's duties as non-delegable. *Id.* As such, “[h]ighway common carriers may not, therefore, insulate themselves from liability for negligence occurring in the conduct of their business by engaging independent contractors to transport freight for them.” *Id.* at 601, 248 P.2d 756.

14. In *Serna v. Pettey Leach Trucking, Inc.*, 110 Cal. App. 4th 1475, 1486, 2 Cal. Rptr. 3d 835 (2003), the California Court of Appeal applied *Eli* to reaffirm that the duty owed by motor carriers to safely operate vehicles on public highways was non-delegable. There, the court held a motor carrier liable for the negligence of its driver, explaining as follows:

“[T]he rule is that a carrier who undertakes an activity (1) which can be lawfully carried on only under a public franchise or authority and (2) which involves possible danger to the public is liable to a third person for harm caused by the negligence of the carrier's independent contractor. If the rule were otherwise, a carrier could escape liability for the negligence of its independent contractors, thus reducing the incentive for careful supervision and depriving those who are injured of the financial responsibility of those to whom the privilege was granted.

See Vargas v. FMI, Inc., 233 Cal. App. 4th 638, 650, 182 Cal. Rptr. 3d 803, 811-812 (2015) (citing *Serna*, 110 Cal. App. 4th 1475, 1486, 2 Cal. Rptr. 3d 835). For these reasons, the carrier's duties were found to be non-delegable. *Serna*, 110 Cal. App. 4th at 1486, 2 Cal. Rptr. 3d 835; see also *Gamboa v. Conti Trucking, Inc.*, 19 Cal. App. 4th 663, 23 Cal. Rptr. 2d 564 (1993) (motor carrier held liable to members of the public for harm caused by the negligence of the carrier's independent contractor.)¹³

¹³ Similarly, in Michigan, a tenant may recover for property damage sustained as the result of the negligence of an independent contractor employed by the landlord to repair the leased premises. Such recovery is allowed irrespective of whether or not the landlord undertook to have the repairs gratuitously made or did so pursuant to the agreement between him and the lessee. *Misiulis v. Milbrand Maint. Corp.*, 218 N.W. 2d 68, 72 (Mich. App. 1974); *Peerless Mfg. Co. v. Bagley*, 126 Mich. 225, 85 N.W. 568 (1901).

15. Similarly to the reasoning explained in the California cases, *infra*, the Hearing Examiner and the Commission could easily find in this proceeding that Delmarva has a similar non-delegable duty that cannot be abdicated by using an independent contractor—especially since Mr. Benfer’s property is within Delmarva gas distribution service territory.

16. Contrary to Delmarva’s arguments, Mr. Benfer has adequately stated a complete complaint that meets the minimum filing requirements under 26 *Del. Admin. C.* §1001-1001-2.3.1. Based on the arguments above (*supra*), the Complaint falls within the jurisdictional powers of the Commission. More specifically, Mr. Benfer identifies the defendants of the Complaint as Delmarva (a regulated public utility) and BCCI. He also alleges that "acting on behalf of Delmarva" BCCI "caused the depression of four sections of pavement" on Mr. Benfer's property "for the installation of a gas line." Complaint, ¶2. Hence, the Complaint has alleged sufficient facts as required by the Commission’s Rules of Practice and Procedure. See 26 *Del. Admin. C.* §1001-1001-2.3.1. In addition, Mr. Benfer has adequately stated a claim upon which relief can be granted by the Commission. The Complaint requests relief "by replacement of the four sections of walk." Complaint, ¶3. Based on Delaware law, the Commission has the authority to order that Delmarva replace Mr. Benfer’s damaged property. See, e.g., 26 *Del. C.* §1302(b)(2)a and 26 *Del. C.* §902(c)(1). Hence, Delaware laws show that the Commission can order a remedy, such as the type requested by Mr. Benfer. The Hearing Examiner and Commission should therefore allow the Complaint to move forward to an evidentiary hearing.

17. Moreover, the Commission possesses the power and authority to order Delmarva to repair and restore Mr. Benfer’s damaged property caused when BCCI performed—at the direction of Delmarva--excavation work to install, fix, or maintain Delmarva’s underground natural gas pipes. The relief requested in the Complaint is “replacement of the four sections of

walk.” Complaint, ¶3. As the body that exercises exclusive and original jurisdictional power over all public utilities, the Commission may fashion a remedy in response to the Complaint.

CONCLUSION

18. The Commission holds the exclusive and original jurisdiction over the Complaint based on Delaware case law and statutes. Moreover, to hold otherwise would lead to an abhorrent policy of allowing regulated public utilities to abdicate their responsibilities to avoid damaging the property of others when excavating and installing underground natural gas pipes. In addition, the Complaint contains sufficient facts, meets the minimum filing requirements for a formal complaint, and sufficiently states a requested remedy. Therefore, the Hearing Examiner should rule that the Commission possesses jurisdiction to hold evidentiary hearings for the Complaint.

Dated: October 16, 2015

Respectfully submitted,

/s/ Julie M. Donoghue

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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE APPLICATION)	
OF ARTESIAN WATER COMPANY, INC.)	PSC DOCKET NO. 14-132
FOR A REVISION OF RATES)	
(Filed April 11, 2014))	

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2015, I caused the attached **OPPOSITION OF STAFF OF THE DELAWARE PUBLIC SERVICE COMMISSION TO DELMARVA POWER & LIGHT COMPANY'S ANSWER AND MOTION TO DISMISS** to be served by on all persons on the accompanying service list by both electronic email and via DelaFile.

Dated: October 16, 2015

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